# Legal Rights

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RIGHT TO KNOW—RIGHT TO HEALTH
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# SUPREME COURT UPHOLDS OSHA "GENERAL DUTY" CLAUSE

The OSHA "General Duty" Clause can be used to cite employers for hazards not adequately covered by specific standards. In other words, an employers' compliance with a specific OSHA standard does not free the employer from a broader general duty under federal law to maintain a safe workplace. A recent Supreme Court decision of a UAW case provides a major victory which expands workers' rights against job hazards.

The legal case arose from a series of incidents, including a fatality, in which workers were overcome by solvent vapors used to clean the interiors of armored vehicles during manufacture. The so-called "safety" trichloro-trifluoroethane solvent, sometimes known as Freon 113 or Genosolve D resulted in several worker illnesses requiring hospital visits and the tragic death of Brother Harvey Lee. Under intense Union pressure, OSHA cited the General Dynamics Land Systems Division for a violation of the General Duty clause. The citation was upheld by the U.S. Court of Appeals and reaffirmed by the Supreme Court.

The OSHA General Duty Clause (Section 5(a)(1) of the OSHA Law) states:

"Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards which are causing or are likely to cause death or serious physical harm to his employees."

Citations under the General Duty Clause are the only way OSHA can force employers to correct unsafe conditions related to lockout, confined space entry, repeated trauma disorders and the like which are not addressed by specific standards. Unfortunately, the General Duty Clause had virtually been written out of the OSHA law by the Reagan-appointed administrative law judges of the Occupational Safety and Health Review Commission (OSHRC). This court decision flatly over-ruled the OSHRC and restored the General Duty Clause.

The court decision made an important point:

**"This analysis emphasizes the fact that the duty to protect employees is imposed on the employer, and**

*(Continued on Page 8)*

## Degreaser: Almost-Sudden Death

A recent report in the Journal of Occupational Medicine (June, 1987) describes a previously healthy woman who spent 2½ hours cleaning parts in a trichloroethylene degreaser during which time she had extensive skin contact with the solvent because of leaking gloves and spillage over the top of her gloves. Almost immediately she experienced severe blistering and inflammation of her hands and arms; within days she had a reaction that involved skin eruptions, muscular weakness, fatigue and joint problems that gradually spread over her entire body. Her condition worsened over the following 10 months with repeated hospitalizations and increasing muscle wasting and loss of muscular control and then she died. The conclusion of the doctors was that this woman had a general immunological disease called progressive systemic sclerosis in which the skin, kidneys, lungs and connective tissue generally are attacked. There have been other less severe cases of this reaction to heavy skin contact with trichloroethylene. Of course it isn't clear whether it was the trichloroethylene alone or the chemicals dissolved in it that was the likely cause, but then all degreasers have chemicals dissolved in them — that's their whole purpose, to remove chemicals from parts. (Lockey, J.E. et al: Progressive Systemic Sclerosis Associated with Exposure to Trichloroethylene, JOM 1987: p. 493-499.)

# LOCAL UNION IMPROVES WELDING PROTECTION

Local 1292, which represents hourly employes at GM-BOC Grand Blanc Stamping Plant, set out to find respiratory protection for their members who perform welding. The Union Safety Committee was able to convince management of the health hazards associated with welding fumes and smoke, and their respiratory protection was needed on jobs without adequate ventilation. Traditional respiratory protection meant that welders had to put up with uncomfortable and hot respirators that were used under their welding helmets. Traditional welding respirators made it impossible for welders with facial hair to get a good fit.

A new type of NIOSH approved welding helmet (powered air positive pressure) offers respiratory protection built into the welding helmet. The welder wears a power pack equipped with filter cartridges on a belt. The power pack draws air through the filter cartridges up through a tube and blows filtered air down into the welders breathing zone. A disposable face seal is used, which requires no fit test. The helmets have improved working conditions to such an extent, that welders in the plant wear the helmets for almost every welding job.

Submitted by:

Mark Browder
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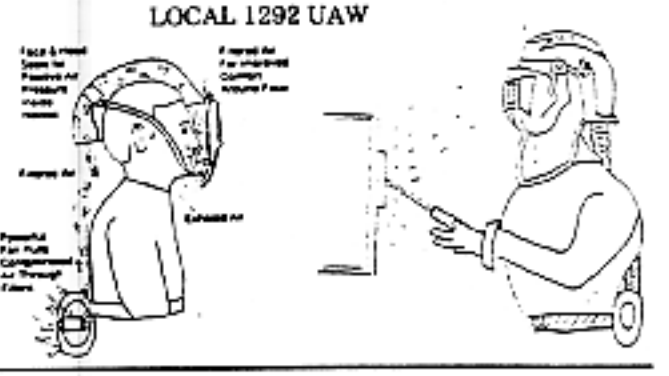

*(Continued from Page 2)*

**the hazards against which he has the obligation to protect necessarily include those of which he has specific knowledge. Therefore if (as is alleged in this case) an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which his employees are exposed, he has a duty under section 5(a)(1) to take whatever measures may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers. In sum, if an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard."**

UAW Local 1200 became extremely concerned about the dangers of fluorocarbons in March 1982, when a member was overcome by vapors of the solvent in an assembly line pit. In March and July of 1983, other workers were overcome while driving assembled tanks which had been cleaned with the solvent, and then in September 1983 still another worker was overcome by solvent vapors after entering a partially assembled tank that had been cleaned. The UAW filed OSHA complaints and grievances for each incident. After the September 1983 incident the Union demanded that a criminal investigation be made of the dangerous use of the solvent. While OSHA was responding to the investigation on request, a UAW member at a nearby repair facility died of a cardiac arrhythmia triggered by inhaling fluorocarbon vapors while trying to drive a completed tank that had been cleaned by this solvent.

Management relied on the alleged low toxicity of fluorocarbons for protection. The facts are that people can tolerate higher air concentrations of fluorocarbons before they experience the central nervous system intoxication common to all solvents. However, fluorocarbons have an additional toxic property: it can suddenly cause an irregular heartbeat (cardiac arrthythmia) which can be fatal. Fluorocarbons also evaporate more quickly and has less odor than other solvents. Thus the "less" toxic solvent was actually more dangerous in use and proved fatal for Harvey Lee.

An intense public campaign followed this death. A week of front page publicity, a nationwide corporate campaign, and a congressional hearing on health and safety and labor relations practices in General Dynamics followed. OSHA issued two willful citations against General Dynamics for the last two non-fatal incidents, and the State of Michigan issued two willful citations and began a criminal prosecution regarding the fatality.

The federal OSHA investigation is complete. The State of Michigan criminal investigation and additional citations are still pending after numerous appeals.

In this case, Local Union action and careful keeping of grievance records and minutes from meetings documented the employers lack of protection for UAW members. Unfortunately, the OSHA actions were not sufficient to stop the negligent actions of the company which led to the fatality.

The Court's resurrection of the general duty clause can be a tool to win better health and safety conditions. Union participation in all aspects of OSHA are critical. Documentation of worker complaints, health and safety hazards and any health and safety meetings are critical for these cases. Maybe the loss to Harvey Lee's family will not have to be in vain.

UAW H&S Fact Sheet

# A Step-by-Step Look at OSHA Handling of 11(c) Discrimination Cases

OSHA has the sole discretion to prosecute a discrimination case under Section 11(c) of the Act. The complainant or representative must first convince the OSHA investigator of the merit of the case and the chance to win before any action will be taken against the employer. Understanding the OSHA procedure will help build a case. The procedures are laid out in the *OSHA Field Operations Manual*. The union representative and complainant should fraternally but firmly establish their rights in this process.

## 1 Worker Files Complaint.

A complaint can be made verbally or in writing, to any OSHA official. The worker may chose to have a representative file. It is preferable that the complaint be in writing, to create a written record and to ensure that OSHA understands the case. The worker and union representative should confer before writing and sending in the complaint. A detailed explanation of the case (including statements, evidence, phone numbers of witnesses, map of workplace, etc.) should be developed, carefully organized and sent with the complaint (or soon thereafter).

*Remember:*

* Always file within the 30 day limit set for 11(c) complaints. Do not wait for the outcome of grievances or any other proceedings.
* Never overwhelm OSHA with contradictory, confusing or disorganized evidence. Be organized.

## 2 OSHA Should Immediately Document Receipt of Complaint.

How fast is OSHA supposed to move on 11(c) complaints? According to the *OSHA Field Operations Manual*, steps begin immediately. Each OSHA Region has a person in charge of discrimination complaints, called the Regional Supervisory Investigator (RSI). If the complaint is made verbally, and the person is in the OSHA office, the OSHA official shall "call the RSI immediately . . . so that the complainant can be interviewed by telephone or in person." Otherwise, the OSHA official must complete an OSHA Form 82, Report of Filing of Complaint Under 11(c), and send it "to the RSI on the day of receipt of the complaint."

## 3 OSHA Interview of The Complainant.

The *OSHA Field Operations Manual* is explicit regarding the steps investigators must take when handling 11(c) cases. For example, the manual instructs investigators, upon receipt of any complaint or inquiry, to "interview the complainant by telephone or in person to determine if the complaint is appropriate for processing."

*Two warnings about this step in the process:*

*1. Be prepared for the initial interview.* Cases have been lost at this stage because the case was poorly presented to the investigator (facts left out, arguments jumbled, management response not anticipated) or because OSHA cut the initial interview short. Don't let this happen. Insist that the complainant have the opportunity to present all facts and arguments. Union representatives can play a valuable role at this stage by helping to organize and argue the case. It is wise for representatives to be present at the interview or participate in a three way phone call.

*2. Don't let OSHA give management an advantage in the early stages.* The investigator may conduct a short or incomplete interview and then speak to management at length. This gives management an advantage at presenting arguments and evidence. Union representatives should intervene early-on to prevent this from happening.

## 4 Early Attempt at Resolution Is Encouraged.

Once complaints are screened, and deemed to have merit, The OSHA *Field Operations Manual* instructs investigators to attempt early resolution of complaints. The complainant and representative should let OSHA know that they are aware of this recommendation. It may be a good idea to discuss with the investigator what plans they have to achieve early resolution. Doing so may ensure that the investigator actually attempts resolution early on in the case, before management positions have hardened and back-pay has accrued.

*Remember:* The chances of early resolution improve when a combination of tactics are used to fight the discipline. The complainant and representative should consider using means such as media outreach, member-

ship pressure and publicity in union newsletters to encourage quick resolution of the problem.

## 5 The OSHA Field Investigation.

The *OSHA Field Operations Manual* includes a number of instructions to investigators regarding the conduct of field investigations.

- The investigation "shall begin as soon as possible" after completion of the screening.
- The employer should not have been notified of the complaint until just before the investigator begins her/his investigation.
- Employer notification "shall normally be delivered in person by the investigator at the start of the investigation. . ." In other words, the investigator is instructed to notify management by going to the workplace personally and beginning the workplace investigation immediately.
- Arrangements should be made at the interview stage for participation by the complainant and representative.

Preparation is required for the OSHA investigation. Witnesses should be prepared to give their statements. Documents relevant to the case should be requested ahead of time (making it harder for management to stall when OSHA requests them). If workplace conditions are different than at the time of the incident, be prepared to point this out to the OSHA investigator.

Union representatives should also be prepared to prevent management from stalling the investigation. If the company has a history of aggressive handling of OSHA investigations (refusing entry, withholding documents, etc.) make this known to the investigator *ahead of time*, so that he or she may plan ahead.

Call OSHA immediately after the workplace investigation. Review the case with the investigator and try to determine OSHA's perspective. Ask about the evidence and arguments presented by management. Be prepared to rebut these arguments.

The OSHA officer's visit to the workplace may include an investigation of other workplace hazards, even ones unconnected to the complaint. Representatives may want to be ready for this.

## 6 Field Investigation Report.

The investigator must submit a Final Investigation Report to the Regional Supervisory Investigator. The report should set forth the facts of the case and any recommendations. It should include a section dealing with back pay, damages and legal fees. Get a copy of this report. Check to ensure that facts are correct and remedies are appropriate. Contact the state or regional OSHA director if the report is inaccurate. The report must be provided under the Freedom of Information Act (FOIA).

## 7 Withdrawals Not To Be Solicited.

Investigators are instructed that: "Withdrawals are not to be solicited by OSHA." However, investigators are allowed to close a case "if the complainant does not cooperate in the completion of the investigation." Follow through on all requests made by the investigator, or explain why it can't be done.

## 8 The 90 Day Time Limit for Closing of Cases.

OSHA rigidly enforces the 30 day limit for filing cases, but is lenient when it comes to the limit (90 days) set for completion (closing) of the case. Cases often drag on much longer, sometimes a year or more. In the short-term, union representatives should remind investigators of the 90 day time limit and push for timely resolution. In the long-term, OSHA reform could help alleviate this problem to some degree.

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# DEPARTMENT OF LABOR REGULATIONS ON DISCRIMINATION AGAINST EMPLOYEES EXERCISING RIGHTS UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT

(Code of Federal Regulations, Title 29, Chapter XVII, Part 1977; Issued by 38 FR 2681, January 29, 1973; amended by 38 FR 4577, February 16, 1973; 42 FR 47344, September 20, 1977; corrected by 44 FR 74819, December 18, 1979; amended by 45 FR 72119, October 31, 1980; 50 FR 32846, August 15, 1985; 51 FR 24528, July 7, 1986)

TITLE 29—LABOR

## PART 1977—DISCRIMINATION AGAINST EMPLOYEES EXERCISING RIGHTS UNDER THE WILLIAMS-STEIGER OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

### General



### Specific Protections



### Procedures



### Some Specific Subjects



**Authority:** Secs. 8, 11, Occupational Safety and Health Act of 1970, 29 U.S.C. 657, 660); Secretary of Labor's Order No. 12-71 (36 FR 8754).

### General

**§ 1977.1 Introductory statement.**

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See Part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

**§ 1977.2 Purpose of this part.**

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

**§ 1977.3 General requirements of section 11(c) of the Act.**

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs,

lodge a complaint with the Secretary of Labor alleging such violation. The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

**§ 1977.4 Persons prohibited from discriminating.**

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, Meek v. United States, 136 F. 2d 679 (6th Cir., 1943); Bowe v. Judson C. Burns, 137 F. 2d 37 (3rd Cir., 1943).

**§ 1977.5 Persons protected by section 11(c).**

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." However, the broad remedial nature of this legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See, U.S. v. Silk, 331 U.S. 704 (1947); Rutherford Food Corporation v. McComb, 331 U.S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, NLRB v. Lamar Creamery, 246 F. 2d 8 (5th Cir., 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

(c) In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

**§ 1977.6 Unprotected activities distinguished.**

(a) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non- prohibited considerations. See, NLRB v. Dixie Motor Coach Corp., 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See, Mitchell v. Goodyear Tire & Rubber Co., 278 F. 2d 562 (8th Cir., 1960); Goldberg v. Bama Manufacturing, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

**Specific Protections**

**§ 1977.9 Complaints under or related to the Act.**

(a) Discharge of, or discrimination against, an employee because the employee has filed "any complaint * * * under or related to this Act * * *" is prohibited by section 11(c). An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 p. P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

**§ 1977.10 Proceedings under or related to the Act.**

(a) Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and Part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and Part 1905 of this

chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

**§ 1977.11 Testimony.**

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act is also prohibited by section 11(c). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee, but would extend to any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is giving or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

**§ 1977.12 Exercise of any right afforded by the Act.**

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[1977.11 amended by 38 FR 4577, February 16, 1973]

## Procedures

**§ 1977.15 Filing of complaint for discrimination.**

(a) *Who may file.* A complaint of section 11(c) discrimination may be filed by the employee himself, or by a representative authorized to do so on his behalf.

(b) *Nature of filing.* No particular form of complaint is required.

(c) *Place of filing.* Complaint should be filed with the Area Director (Occupational Safety and Health Administration) responsible for enforcement activities in the geographical area where the employee resides or was employed.

(d) *Time for filing.* (1) Section 11(c)(2) provides that an employee who believes that he has been discriminated against in violation of section 11(c)(1) "may, within 30 days after such violation occurs," file a complaint with the Secretary of Labor.

(2) A major purpose of the 30-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.

(3) However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency, among others, are circumstances which do not justify tolling the 30-day period. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

[1977.15(d)(3) revised by 50 FR 32846, August 15, 1985]

**§ 1977.16 Notification of Secretary of Labor's determination.**

Section 11(c)(3) provides that the Secretary is to notify a complainant within 90 days of the complaint of his determination whether prohibited discrimination has occurred. This 90-day provision is considered directory in nature. While every effort will be made to notify complainants of the Secretary's determination within 90 days, there may be instances when it is not possible to meet the directory period set forth in section 11(c)(3).

**§ 1977.17 Withdrawal of complaint.**

Enforcement of the provisions of section 11(c) is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee

to withdraw a previously filed complaint will not necessarily result in termination of the Secretary's investigation. The Secretary's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and uncoerced request from a complainant to withdraw his complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.

**§ 1977.18 Arbitration or other agency proceedings.**

(a) *General.* (1) An employee who files a complaint under section 11(c) of the Act may also pursue remedies under grievance arbitration proceedings in collective bargaining agreements. In addition, the complainant may concurrently resort to other agencies for relief, such as the National Labor Relations Board. The Secretary's jurisdiction to entertain section 11(c) complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The Secretary may file action in U.S. district court regardless of the pendency of other proceedings.

(2) However, the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements. See, e.g., Boy's Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Carey v. Westinghouse Electric Co., 375 U.S. 261 (1964); Collier Insulated Wire, 192 NLRB No. 150 (1971). By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 11(c) complaints.

(3) Where a complainant is in fact pursuing remedies other than those provided by section 11(c), postponement of the Secretary's determination and deferral to the results of such proceedings may be in order. See, Burlington Truck Lines, Inc., v. U.S., 371 U.S. 156 (1962).

(b) *Postponement of determination.* Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under section 11(c) and those proceedings are not likely to violate the rights guaranteed by section 11(c). The factual issues in such proceedings must be substantially the same as those raised by section 11(c) complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination. See Rios v. Reynolds Metals Co., F.2d (5th Cir., 1972), 41 U.S.L.W. 1049 (Oct. 10, 1972); Newman v. Avco Corp., 451 F.2d 743 (6th Cir., 1971).

(c) *Deferral to outcome of other proceedings.* A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-to-case basis, after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the section 11(c) complaint.

**Some Specific Subjects**

**§ 1977.21 [Removed]**

[1977.21 deleted by 45 FR 72119, October 31, 1980]

**§ 1977.22 Employee refusal to comply with safety rules.**

Employees who refuse to comply with occupational safety and health standards or valid safety rules implemented by the employer in furtherance of the Act are not exercising any rights afforded by the Act. Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by section 11(c). This situation should be distinguished from refusals to work, as discussed in § 1977.12.

**§ 1977.23 State plans.**

A State which is implementing its own occupational safety and health enforcement program pursuant to section 18 of the Act and Parts 1902 and 1952 of this chapter must have provisions as effective as those of section 11(c) to protect employees from discharge or discrimination. Such provisions do not divest either the Secretary of Labor or Federal district courts of jurisdiction over employee complaints of discrimination. However, the Secretary of Labor may refer complaints of employees adequately protected by State Plans' provisions to the appropriate state agency. The basic principles outlined in § 1977.18, supra will be observed as to deferrals to findings of state agencies.

UAW H&S Fact Sheet

# Electing "Party Status" After a Citation

As soon as your employer has filed a notice of contest to the citation, you have a right to elect party status in the case. This is your only means of insuring that the employees' interests will be protected throughout the case.

Asserting party status does not commit the union to taking part in hearings, etc. It simply means the union can do so if they wish to, when the time comes. Party status is the only way the union can get documents pertinant to the case. Such documents are often useful in formulating a union position while in the process of reaching a settlement.

Although you can elect party status any time before the hearing begins, you should do so immediately after your employer has challenged the citation. This will enable you to play an active role from the beginning and help insure a favorable outcome in the case.

If workers in your plant are represented by a union, then the union is considered the "authorized employee representative" for purposes of declaring party status.

In order to elect party status, all you have to do is write a letter to the Occupational Safety and Health Review Commission informing them of your desire to participate in the case. The address can be found on the letter of contest.

You must also serve a copy of this letter on your employer and the OSHA Area Director, whose name and address appears at the top of the citation. You should send the letters Certified Mail-Return Receipt Requested.

Once you have party status you are entitled to the following:

*Receive copies of all documents filed in the case
*Request information from your employer as part of the discovery process
*Participate in conferences and settlement negotiations between OSHA and your employer
*Present witnesses and evidence at the hearing
*Cross-examine company witnesses
*Make oral and written arguments
*Request that the Review Commission review an adverse judge's decision or unfair settlement agreement
*Appeal to the U.S. Circuit Court of Appeals, if necessary.

Even after you have declared party status, it will still be up to you to make sure that you are informed of all settlement negotiations between your employer and OSHA. You should call the lawyer in the Solicitor's Office that is handling your case and tell him that you want to fully participate in any meetings about the case. If you find out that you were not informed of a meeting, you should write a letter to the judge assigned to the case and inform him of the problem.

## Sample Letter

Executive Secretary
OSHA Review Commission
[address]

Dear [ ],

We formally request to elect party status on behalf of the affected workers in OSHRC Docket No. [ ]. UAW Local [ ] is the authorized bargaining agent for the affected employees of [ ].

We request that copies be sent to us of all files in this case as we wish to participate in the hearing.

Sincerely,

[ , union position]

cc: H&S Dept, International UAW
UAW Regional Office
Company Reps

## CASE STUDY

## ADVANCED LEGAL RIGHTS

On August 29, 1990, Mr. John Smith was hired by XXX Battery, Inc. as a maintenance mechanic. Mr. Smith was working many days in excess of the normal 8 hour workshift.

On September 15, Mr. Smith asked the company nurse about being fitted with a respirator. On the following day he also asked his supervisor about a respirator.

On September 26, Mr. Smith was told to shower at lunchtime as well as his usual showering time, at the end of his workshift because of the indications that he had high lead exposure.

Mr. Smith's lead in blood results for three testing periods were 12, 46, and 52 ug/100gm, respectively. On October 25, 1990, the 58th day of his employment and just two days prior to the end of his probationary period, Mr. Smith was called in to a meeting with company officials and told that because his blood lead level was 52 ug/100gm, they would have to terminate his employment.

Soon after his termination, Mr. Smith had his own blood test done indicating a blood lead level of 55 ug/100gm.

Mr Smith had received perfect performance reviews from his supervisor during the entire term of his employment with the company.

As the union health and safety representative at XXX Battery, Inc., how would you assist your local in handling this specific case?

Using the materials you've been provided and what you have just learned in this class, list and discuss your possible actions.

** Appoint a reporter and recorder to list your plan of action. The reporter should be prepared to speak for the group.

# CASE STUDY QUESTIONS

## INSTRUCTIONS:

In your small group, discuss the following questions and use them to come up with your action plan on handling this situation. The recorder should write your plan on chart paper,and your reporter should be prepared to describe your actions to the class.

## QUESTIONS TO CONSIDER:

1. Does the General Duty clause apply in this case? If so, describe how.

2. Is this a case of discrimination under OSHA's 11c section? Who should file?... The discharged worker?... The Local Union? What are the time limits that apply?

3. Should a grievance be filed in this case? If so, how do you coordinate this with the Chief Steward or Committeeperson? (This varies from contract to contract)

4. What protections, if any, are available under the OSHA Lead Standard 1910.1025?

5. How does Party Status apply here? If it applies, when should you file?

UNITED STATES DEPARTMENT OF LABOR

Occupational Safety and Health Administration

Part Number 1910

Standard Number 1910.1025 (with appendices A, B, and C)

Title Lead.

(j) Medical surveillance

(1) General.

(i) The employer shall institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year.

(ii) The employer shall assure that all medical examinations and procedures are performed by or under the supervision of a licensed physician.

(iii) The employer shall provide the required medical surveillance including multiple physician review under paragraph (j)(3)(iii) without cost to employees and at a reasonable time and place.

(2) Biological monitoring

(i) Blood lead and ZPP level sampling and analysis. The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraph (j)(1)(i) of this section
on the following schedule:

(A) At least every 6 months to each employee covered under paragraph (j)(1)(i) of this section;

(B) At least every two months for each employee whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/100 g of whole blood. This frequency shall continue until two consecutive blood samples and analyses indicate a blood lead level below 40 ug/100 g of whole blood; and

(C) At least monthly during the removal period of each employee removed from exposure to lead due to an elevated blood lead level.

(ii) Follow-up blood sampling tests. Whenever the results of a blood lead level test indicate that an employee's blood

lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i), the employer shall provide a second (follow-up) blood sampling test within two weeks after the employer receives the results of the first blood samplingtest.

(iii) Accuracy of blood lead level sampling and analysis. Blood lead level sampling and analysis provided pursuant to this section shall have an accuracy (to a confidence level of 95 percent) within plus or minus 15 percent or 6 Œg/100ml, whichever is greater, and shall be conducted by a laboratory licensed by the Center for Disease Control, United States Department of Health, Education and Welfare (CDC) or which has received a satisfactory grade in blood lead proficiency testing from CDC in the prior twelve months.

(iv) Employee notification. Within five working days after the receipt of biological monitoring results, the employer shall notify in writing each employee whose blood lead level exceeds 40 ug/100 g: (A) of that employee's blood lead level and (B) that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

**(3) Medical examinations and consultations**

(i) Frequency. The employer shall make available medical examinations and consultations to each employee covered under paragraph (j)(1)(i) of this section on the following schedule:

(A) At least annually for each employee for whom a blood sampling test conducted at any time during the preceding 12 months indicated a blood lead level at or above 40 Œg/100 g;

(B) Prior to assignment for each employee being assigned for the first time to an area in which airborne concentrations of lead are at or above the action level;

(C) As soon as possible, upon notification by an employee either that the employee has developed signs or symptoms commonly associated with lead intoxication, that the employee desires medical advice concerning the effects of current or past exposure to lead on the employee's ability to procreate a healthy child, or that the employee has demonstrated difficulty in breathing during a respirator fitting test or during use; and

(D) As medically appropriate for each employee either removed from exposure to lead due to a risk of sustaining material impairment to health, or otherwise limited pursuant to a final medical determination.

(ii) Content. Medical examinations made available pursuant to paragraph (j)(3)(i)(A)-(B) of this section shall include the following elements:

(A) A detailed work history and a medical history, with particular attention to past lead exposure (occupational and non-occupational), personal habits (smoking, hygiene), and past gastrointestinal, hematologic, renal, cardiovascular, reproductive and neurological problems;

(B) A thorough physical examination, with particular attention to teeth, gums, hematologic, gastrointestinal, renal, cardiovascular, and neurological systems. Pulmonary status should be evaluated if respiratory protection will be used;

(C) A blood pressure measurement;

(D) A blood sample and analysis which determines:

(1) Blood lead level;
(2) Hemoglobin and hematocrit determinations, red cell indices, and examination of peripheral smear morphology;
(3) Zinc protoporphyrin;
(4) Blood urea nitrogen; and,
(5) Serum creatinine;

(E) A routine urinalysis with microscopic examination; and

(F) Any laboratory or other test which the examining physician deems necessary by sound medical practice. The content of medical examinations made available pursuant to paragraph (j)(3)(i)(C)(D) of this section shall be determined by an examining physician and, if requested by an employee, shall include pregnancy testing or laboratory evaluation of male fertility.

(iii) Multiple physician review mechanism.

(A) If the employer selects the initial physician who conducts any medical examination or consultation provided to an employee under this section, the employee may designate a second physician:

(1) To review any findings, determinations or recommendations of the initial physician; and
(2) To conduct such examinations, consultations, and laboratory tests as the second physician deems necessary to facilitate this review.

(B) The employer shall promptly notify an employee of the right to seek a second medical opinion after each occasion that an initial physician conducts a medical examination or

consultation pursuant to this section. The employer may condition its participation in, and payment for, the multiple physician review mechanism upon the employee doing the following within fifteen (15) days after receipt of the foregoing notification, or receipt of the initial physician's written opinion, whichever is later:

(1) The employee informing the employer that he or she intends to seek a second medical opinion, and

(2) The employee initiating steps to make an appointment with a second physician.

(C) If the findings, determinations or recommendations of the second physician differ from those of the initial physician, then the employer and the employee shall assure that efforts are made for the two physicians to resolve any disagreement.

(D) If the two physicians have been unable to quickly resolve their disagreement, then the employer and the employee through their respective physicians shall designate a third physician:

(1) To review any findings, determinations or recommendations of the prior physicians; and

(2) To conduct such examinations, consultations, laboratory tests and discussions with the prior physicians as the third physician deems necessary to resolve the disagreement of the prior physicians.

(E) The employer shall act consistent with the findings, determinations and recommendations of the third physician, unless the employer and the employee reach an agreement which is otherwise consistent with the recommendations of at least one of the three physicians.

(iv) Information provided to examining and consulting physicians.

(A) The employer shall provide an initial physician conducting a medical examination or consultation under this section with the following information:

(1) A copy of this regulation for lead including all Appendices;

(2) A description of the affected employee's duties as they relate to the employee's exposure;

(3) The employee's exposure level or anticipated exposure level to lead and to any other toxic substance (if applicable);

(4) A description of any personal protective equipment used or to be used;

(5) Prior blood lead determinations; and

(6) All prior written medical opinions concerning the employee in the employer's possession or control.

(B) The employer shall provide the foregoing information to a second or third physician conducting a medical examination or consultation under this section upon request either by the second or third physician, or by the employee.

(v) Written medical opinions.

(A) The employer shall obtain and furnish the employee with a copy of a written medical opinion from each examining or consulting physician which contains the following information:

(1) The physician's opinion as to whether the employee has any detected medical condition which would place the employee at increased risk of material impairment of the employee's health from exposure to lead;
(2) Any recommended special protective measures to be provided to the employee, or limitations to be placed upon the employee's exposure to lead;
(3) Any recommended limitation upon the employee's use of respirators, including a determination of whether the employee can wear a powered air purifying respirator if a physician determines that the employee cannot wear a negative pressure respirator; and
(4) The results of the blood lead determinations.

(B) The employer shall instruct each examining and consulting physician to:

(1) Not reveal either in the written opinion, or in any other means of communication with the employer, findings, including laboratory results, or diagnoses unrelated to an employee's occupational exposure to lead; and
(2) Advise the employee of any medical condition, occupational or nonoccupational, which dictates further medical examination or treatment.

(vi) Alternate Physician Determination Mechanisms. The employer and an employee or authorized employee representative may agree upon the use of any expeditious alternate physician determination mechanism in lieu of the multiple physician review mechanism provided by this paragraph so long as the alternate mechanism otherwise satisfies the requirements contained in this paragraph.

**(4) Chelation.**

(i) The employer shall assure that any person whom he retains, employs, supervises or controls does not engage in prophylactic chelation of any employee at any time.

(ii) If therapeutic or diagnostic chelation is to be performed by any person in paragraph (j)(4)(i), the employer shall assure that it be done under the supervision of a licensed physician in a clinical setting with thorough and appropriate medical monitoring and that the employee isnotified in writing prior to its occurrence.

**1910.1025 (k) - MRP**

**(k) Medical Removal Protection**

**(1) Temporary medical removal and return of an employee**

(i) Temporary removal due to elevated blood lead levels

(A) First year of the standard. During the first year following the effective date of the standard, the employer shall remove an employee from work having a daily eight hour TWA exposure to lead at or above 100 ug/m(3) on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 80 ug/100 g of whole blood;

(B) Second year of the standard. During the second year following the effective date of the standard, the employer shall remove an employee from work having a daily 8-hour TWA exposure to lead at or above 50 ug/m(3) on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 70 ug/100 g of whole blood;

(C) Third year of the standard, and thereafter. Beginning with the third year following the effective date of the standard, the employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 60 Œg/100 g of whole blood; and,

(D) Fifth year of the standard, and thereafter. Beginning with the fifth year following the effective date of the standard, the employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that the average of the last three blood sampling tests conducted pursuant to this section (or the average of all blood sampling tests conducted over the previous six (6) months, whichever is longer) indicates that the employee's blood lead level is at or above 50 ug/100 g of whole blood; provided, however, that an employee need not be removed if the last blood sampling test indicates a blood lead level at or below 40 ug/100 g of whole blood.

(ii) Temporary removal due to a final medical determination.

(A) The employer shall remove an employee from work having an exposure to lead at or above the action level on each

occasion that a final medical determination results in a medical finding, determination, or opinion that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

(B) For the purposes of this section, the phrase "final medical determination" shall mean the outcome of the multiple physician review mechanism or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section.

(C) Where a final medical determination results in any recommended special protective measures for an employee, or limitations on an employee's exposure to lead, the employer shall implement and act consistent with the recommendation.

(iii) Return of the employee to former job status. (A) The employer shall return an employee to his or her former job status:

(1) For an employee removed due to a blood lead level at or above 80 ug/100 g, when two consecutive blood sampling tests indicate that the employee's blood lead level is at or below 60 ug/100 g of whole blood;

(2) For an employee removed due to a blood lead level at or above 70 ug/100 g, when two consecutive blood sampling tests indicate that the employee's blood lead level is at or below 50 ug/100 g of whole blood;

(3) For an employee removed due to a blood lead level at or above 60 ug/100 g, or due to an average blood lead level at or above 50 ug/100 g, when two consecutive blood sampling tests indicate that the employee's blood lead level is at or below 40 ug/100 g of whole blood;

(4) For an employee removed due to a final medical determination, when a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

(B) For the purposes of this section, the requirement that an employer return an employee to his or her former job status is not intended to expand upon or restrict any rights an employee has or would have had, absent temporary medical removal, to a specific job classification or position under the terms of a collective bargaining agreement.

(iv) Removal of other employee special protective measure or limitations. The employer shall remove any limitations placed on an employee or end any special protective measures provided to an employee pursuant to a final medical determination when a subsequent final medical determination

indicates that the limitations or special protective measures are no longer necessary.

(v) Employer options pending a final medical determination. Where the multiple physician review mechanism, or alternate medical determination mechanism used pursuant to the medical surveillance provisions of this section, has not yet resulted in a final medical determination with respect to an employee, the employer shall act as follows:

(A) Removal. The employer may remove the employee from exposure to lead, provide special protective measures to the employee, or place limitations upon the employee, consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employee's health status.

(B) Return. The employer may return the employee to his or her former job status, end any special protective measures provided to the employee, and remove any limitations placed upon the employee, consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employee's health status, with two exceptions. If

(1) the initial removal, special protection, or limitation of the employee resulted from a final medical determination which differed from the findings, determinations, or recommendations of the initial physician or

(2) The employee has been on removal status for the preceding eighteen months due to an elevated blood lead level, then the employer shall await a final medical determination.

**(2) Medical removal protection benefits**

(i) Provision of medical removal protection benefits. The employer shall provide to an employee up to eighteen (18) months of medical removal protection benefits on eachoccasion that an employee is removed from exposure to lead or otherwise limited pursuant to this section.

(ii) Definition of medical removal protection benefits. For the purposes of this section, the requirement that an employer provide medical removal protection benefits means that the employer shall maintain the earnings, seniority and other employment rights and benefits of an employee as though the employee had not been removed from normal exposure to lead or otherwise limited.

(iii) Follow-up medical surveillance during the period of employee removal or limitation. During the period of time that an employee is removed from normal exposure to lead or otherwise limited, the employer may condition the provision

of medical removal protection benefits upon the employee's participation in follow-up medical surveillance made available pursuant to this section.

(iv) Workers' compensation claims. If a removed employee files a claim for workers' compensation payments for a lead-related disability, then the employer shall continue to provide medical removal protection benefits pending disposition of the claim. To the extent that an award is made to the employee for earnings lost during the period of removal, the employer's medical removal protection obligation shall be reduced by such amount. The employer shall receive no credit for workers' compensation payments received by the employee for treatment related expenses.

(v) Other credits. The employer's obligation to provide medical removal protection benefits to a removed employee shall be reduced to the extent that the employee receives compensation for earnings lost during the period of removal either from a publicly or employer-funded compensation program, or receives income from employment with another employer made possible by virtue of the employee's removal.

(vi) Employees whose blood lead levels do not adequately decline within 18 months of removal. The employer shall take the following measures with respect to any employee removed from exposure to lead due to an elevated blood lead level whose blood lead level has not declined within the past eighteen (18) months of removal so that the employee has been returned to his or her former job status:

(A) The employer shall make available to the employee a medical examination pursuant to this section to obtain a final medical determination with respect to the employee;

(B) The employer shall assure that the final medical determination obtained indicates whether or not the employee may be returned to his or her former job status, and if not, what steps should be taken to protect the employee's health;

(C) Where the final medical determination has not yet been obtained, or once obtained indicates that the employee may not yet be returned to his or her former job status, the employer shall continue to provide medical removal protection benefits to the employee until either the employee is returned to former job status, or a final medical determination is made that the employee is incapable of ever safely returning to his or her former job status.

(D) Where the employer acts pursuant to a final medical determination which permits the return of the employee to his or her former job status despite what would otherwise be an unacceptable blood lead level, later questions concerning removing the employee again shall be decided by a final

medical determination. The employer need not automatically remove such an employee pursuant to the blood lead level removal criteria provided by this section.

(vii) Voluntary Removal or Restriction of An Employee. Where an employer, although not required by this section to do so, removes an employee from exposure to lead or otherwise places limitations on an employee due to the effects of lead exposure on the employee's medical condition, the employer shall provide medical removal protection benefits to the employee equal to that required by paragraph (k)(2)(i) of this section.